NATIVE APPEAL COURT REPORTS

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SELECTION OF CASES

DECIDED BY THE

NATIVE APPEAL COURT

FOR THE

TRANSKEIAN TERRITORIES

DURING THE YEARS

1928 - 1929

COMPILED BY

W. J. G. MEARS, B.A., LL.B.

Formerly Clerk of the Native Appeal Court

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CONTENTS.

	PAGE.
PREFACE	V.
INDEX OF CASES ACCORDING TO COURT OF ORIGIN	VII.
ALPHABETICAL INDEX OF LITIGANTS	IX–X.
SUBJECT INDEX	XI–XIV.
REPORTED CASES	1–44.

PREFACE.

This is the final volume of Reports of the Native Territories Appeal Court which was constituted under the Native Territories Appeal Act, 1894, and was superseded by the establishment of a similar Court under the provisions of the Native Administration Act, 1927. Special sessions were held in 1929 to dispose of all appeals noted to the original Court.

The Chief Magistrate of the Transkeian Territories was the *ex-officio* President of the Court. He was assisted in his deliberations by two European assessors, invariably Magistrates, appointed for consultative purposes only. Native assessors were also called to the assistance of the Court in an advisory capacity, in cases where some special point of Native Custom arose.

The Territories were unusually fortunate in having as administrators a number of men under whose guidance the Natives have for the most part progressed from savagery and lawlessness to civilization and order; there can be little doubt that the recognition and retention of tribal customs greatly facilitated the transition from the old to the new conditions.

It is a commonplace to remark that great administrators are often mediocre lawyers, and vice versa; but, fortunately, during the life of this Court the successive Chief Magistrates and Assistant Chief Magistrates were officers who besides being capable administrators were skilful lawyers, being possessed of a sound knowledge of Native Custom and its underlying principles and an excellent judicial sense which led to its correct application. The result is that Reports of this Court contain a comprehensive and reliable record of Native Law and Custom as it is practised throughout these Territories. Its judgments have stood the test of time for in only a negligible number of cases has the Court found it necessary to overrule its previous decisions.

Notwithstanding the impingment of European usages on Native life and institutions at every point of contact, Native Custom has stood deeply entrenched in the mind of the Abantu as a people, and, after more than a century of such contact the survival of Native Custom to the extent to which it exists to-day can be attributed to its extraordinary vitality and to its fitness to the Abantu scheme of life and living. The decisions of the Court have had the effect of preserving and crystallizing custom in so far as it is not repugnant to the white man's sense of justice.

Among the earlier Presidents of the Native Appeal Court were Messrs. Arthur Stanford, W. T. Brownlee, Walter Stanford, C. J. Warner, W. P. Leary, all of whom possessed an intimate knowledge of Natives, their language and their customs.

By common consent it is conceded that the late Arthur Stanford was chiefly responsible through his long and intimate connection with this Court in winning for it the very high reputation which it gained. He possessed in an unusual degree the legal and the judicial mind. His many judgments are to-day referred to with the respect due to so great an authority on Native Custom and they form a solid foundation upon which later Presidents have safely built.

The Native Appeal Courts which have now been established in all the Provinces of the Union are largely modelled on the original Native Appeal Court; no greater tribute could have been paid those who presided over its sessions with such distinction.

This volume should be cited as N.A.C. 6.

INDEX OF CASES ACCORDING TO COURTS OF ORIGIN.

Bizana..... 2, 24, 28.

Butterworth..... 17.

Elliot..... 40.

Elliotdale..... 41, 43.

Engcobo..... 2, 3, 19, 26, 30, 31, 39.

Idutywa..... 5, 26.

Libode..... 36.

Matatiele..... 5, 12, 13, 16, 27

Mount Fletcher..... 8, 9, 37.

Mount Frere..... 14, 38.

Mqanduli..... 6.

Ngqeleni..... 29.

Nqamakwe..... 1.

St. Marks..... 22, 25, 33, 37.

Tabankulu..... 10.

Tsolo..... 4, 11, 21, 34.

Umtata..... 7, 22.

Willowvale..... 42.

INDEX OF LITIGANTS.

A.

PAGE

Adam Dingiswayo *vs.* Alfred Matanda..... 1
Alex Magcoba *vs.* Lizzie Magcoba..... 17
Alfred Matanda *vs.* Adam Dingiswayo..... 1
Amos Sisilana *vs.* Mbuso Galo..... 12

B.

Bantyi Gwe *vs.* Mvandaba Jo..... 25
Bonkolo and Another *vs.* Jim Hani..... 37
Busika Nohele *vs.* Jokoqela Nohele..... 19

E.

Elipha and Elias Boqo *vs.* Mbaliso Mbulawa..... 16

G.

Gada Maboza and Another *vs.* Ngcayicibi..... 5
Gaya Nkwangwana *vs.* Meizwa Mbengana..... 24
Gobi Gaulayo *vs.* Vakele Njaziyaluma..... 30
Gogwana Sibalala *vs.* Tshetshu Tempa and Ano..... 22
Gqasayi Magadla *vs.* Mtshikilelwa Smit..... 36

H.

Henene Makalima *vs.* Sawe Mgudlwa and Ors..... 31
Hobololo Bokileni *vs.* Nthloyila Bokileni..... 43

J.

Jacob Toseni *vs.* Katrina Mdoda..... 40
Jim Hani *vs.* Bonkolo and Ano..... 37
Johannes Mbusi *vs.* Nkululeko Nzo..... 37
Jokoqela Nohele vs. Busika Nohele..... 19
Jolinkomo Mlonyeni *vs.* Nkonyo Maneli..... 41

K.

Kalolo Dlova *vs.* Msweli Baduza..... 8
Kambi Geca *vs.* Rege Skenjana..... 4
Katrina Mdodo *vs.* Jacob Toseni..... 40
Kbana Rangana *vs.* Nkebenkebe Mdingi..... 6
Komani *vs.* Manini..... 26
Kutwana Nkwali *vs.* Mxoli Nyokana..... 13

L.

Lizzie Magcoba *vs.* Alex Magcoba..... 17
Lutoli Notsete *vs.* Makosonke Notsete..... 11

M.

Madlolo Mtshizana and ano. *vs.* Mjila Mtshizana..... 27
Mafly Poni *vs.* Wampuko..... 29
Makosonke Notsete *vs.* Lutoli Notscte..... 11
Makosonke Silimela *vs.* Senseta Cebe..... 14
Manini *vs.* Komani..... 26
Matshini Nonkanga *vs.* Noviwa Nonkanga..... 22
Mbaliso Mbulawa *vs.* Elipha and Elias Boqo..... 16
Mbulawa Fodini *vs.* Shadrach Mbeshu..... 26
Mbuso Galo *vs.* Amos Sisilana..... 12
Meizwa Mbengana *vs.* Gaya Mkwangwana..... 24
Mdiya Neli *vs.* Qiqo Wayiti..... 2
Mdlangaso *vs.* Sigintsolo..... 28
Mjila Mtshizana *vs.* Madlolo Mtshizana and ano..... 27

PAGE

Msuzo *vs.* Qasekonyal 7
Msweli Baduza *vs.* Kalolo Dlova and ano 8
Mvandaba Jo *vs.* Bantyi Gwe 25
Mxoli Nyokana *vs.* Kutwana Nkwali 13
Mzimni Ndabangaye *vs.* Yoni Govu 2
Mzwamandla Siewebu *vs.* Tandani Siewebu 9

N.

Ndleleni Jaji *vs.* Ntsimini Ngcongolo 39
Ngcayicibi *vs.* Gada Maboza and ano 5
Ngcingolo Citelo *vs.* Siyotywa Ngidi 10
Nkebenkebe Mdingi *vs.* Khana Rangana 6
Nkonyo Maneli *vs.* Jolinkomo Mlonyeni 41
Nkululeko Nzo *vs.* Johannes Mbusi 37
Nolangeni Kopu *vs.* Vulangengqele Poni 34
Noviwa Monkanga *vs.* Matshini Nonkanga 22
Noyenki Zibuti *vs.* Thomas Zibuti 21
Nqola Tyaba *vs.* Sikade Vuta 42
Nthloyila Bokileni *vs.* Hobololo Bokileni 43
Ntsimini Ngcingolo *vs.* Ndleleni Jaji 39

P.

Pakamile Petse and ors. *vs.* Thomas Siningwa 3

Q.

Qasekonya *vs.* Msuzo 7
Qiqo Wayiti *vs.* Mdiya Neli 2

R.

Rege Skenjana *vs.* Kambi Geca 4
Rosa Malamlela *vs.* White Malamlela 5

S.

Sawe Mgudlwa and ors. *vs.* Henene Makalima 31
Senseta Cebe *vs.* Makosonke Silimela 14
Shadrach Mbeshu *vs.* Mbulawa Fodini 26
Sigintsolo *vs.* Mdlangaso 28
Sikade Vuta *vs.* Nqola Tyoba 42
Siyotywa Ngidi *vs.* Ngcingolo Citelo 10
Sofonia Ngqeleni *vs.* Zwelonke Gaveni 38
Songololo Ntlabati *vs.* Tshemese Kraai 33

T.

Tandani Siewebu *vs.* Mzwamandla Siewebu 9
Thomas Zibuti *vs.* Noyenki Zibuti 21
Thomas Siningwa *vs.* Pakamile Petse and ors 3
Tshemese Kraai *vs.* Songololo Ntlabati 33
Tshetsha Tempa and ano. *vs.* Gogwana Sibalala 22

V.

Vakele Njaziyaluma *vs.* Gobi Gaulayo 30
Vulangengqele Poni *vs.* Nolangeni Kopu 34

W.

Wampuko *vs.* Mafly Poni 29
White Malamlela *vs.* Rosa Malamlela 5

Y.

Yoni Govu *vs.* Mzimni Ndabangaye 2

Z.

Zwelonke Gaveni *vs.* Sofonia Ngqeleni 38

SUBJECT INDEX.

A.

PAGE

Acceptance of stock by messenger 26
Adultery—Evidence 2
—— Generally 1, 2
—— Without pregnancy 1
Affray—Damages for death of son 31
Animals—Injury by minor 3, 4
Animus Injuriandi—Slander—Privilege 29
Assault—Damages, assessment of 5
—— Damages for in adultery cases 2

B.

Baca Custom 38
Bomvana Custom 43

C.

Catch—Adultery 2
Cattle—Earnest 16
Chiefs only may nominate rank of wives 43
Chief's Tribal Enquiry—Privilege 29
Child—Custody and maintenance 5
—— Legitimisation *per subsequens matrimonium* 24
—— Liability of parent or guardian for torts 3, 4
—— Paternity—Woman's oath 37
—— Rights in child born while mother under "teleka" 6
Christian Marriage—After payment of earnest cattle for another woman 16
—— Payment of dowry usual 12
Claim for pledge before debt settled, premature 36
Commoner—Ranking of wives 43
Compromise—Satisfaction of judgment by 34
Conflict of custom 1, 14
Cow—Injury by minor 3, 4
—— trespassing—Injury by minor 4
Culpa 3, 4

D.

Damages—Acceptance of stock by messenger 26
—— Adultery 1, 2
—— Affray—Death of son 31
—— Assault 2, 5
—— Defamation—Chief's enquiry 29
—— Failure to prove 31
—— Injuries inflicted on stock by minors 3, 4
—— Magistrate's discretion 5
—— Negligence 3
—— Pregnancy discovered after marriage 22
—— Seduction without pregnancy—Baca Custom 38
Death of son—Damages 31
Death of husband 10, 12
Deductions upon return of dowry 10, 12
Defamation—Privilege 29
Default judgment—Re-opening 26
Dependant—Damages in affray cases 31
"Dikazi" 13
Discretion—Magistrate's 5
Disinherison of heir 19
Dowries—Two may not be held for one woman 12
Dowry—Amount payable for "dikazi" 13
—— Claim by heirs 7, 12
—— Dissolution of marriage—refusal of woman to live with husband and tender of dowry constitutes dissolution 22

PAGE
—— Father may act as son's messenger 8
—— Hlubi Custom 14
—— Not customary for father to pay for son's second wife 8
—— Reimbursement of 7, 11, 42
—— Return of, claim by heirs 12
—— Return of, on husband's death 10
—— Tender of, and refusal to live with husband dissolves marriage 22

E.

Elopement fees—" Sidwangu " and " Nqutu " beasts 38
Engagement Cattle—Right in—Neglect of suitor 16
Estate—Disinherison of heir 19
—— Rights and duties of heir 21
Estoppel—Acceptance of stock by messenger 26
Evidence—Adultery case 2
—— Damage—Calculable pecuniary loss 31
—— Presumption of marriage 24
—— Record in previous case inadmissible 37
—— Seduction cases 37
—— Spoliatory actions 27
Execution—Setting aside warrant 34
Extra—Territorial marriages discussed 25

F.

Failure to pay " teleka " fee—Rights in children 6
Father—Procedure in case of disinherison 19
—— May rescind declaration of disinherison 19
Fingo Custom—Damages 1

G.

Guardian—Liable for torts of wards 3, 4
—— Proper person to give children of widow in marriage and receive dowry 39

H.

Heir—Disinherison 19
—— May claim return of dowry on remarriage of widow 12
—— Rights and duties of, during widow's lifetime 21
—— Son of Great House—Rights of 9, 11
—— Son of " Qadi " to Great House 41
—— Son of Right-hand House entitled to dowry appertaining to junior or " Qadi " houses of Right-hand House 11
Hlubi Custom 8, 9, 13, 14
Husband's death shortly after marriage 10
Husband—Desertion of by wife and tender of dowry dissolves marriage ... 22
—— Right of action in respect of wife's pregnancy discovered after marriage 22

I.

Illegitimate children 17, 24
Imputation of witchcraft—Slander 30
Inheritance—Rights of children of widow married by Chirstian rites 17
Interpleader—Sale of property in execution 33
—— Property of " houses " discussed 42

J.

Judgment—Satsifaction of by compromise 34
Jurisdiction of Magistrates 5, 19

L.

Legitimisation *per subsequens matrimonium* 24
Lex Domicilii 14

M.

PAGE
Maintenance of widow by heir 21
Marriage—By Native Custom followed by civil marriage—dowry 14
—— Dissolution by woman 22
—— Extra-Territorial marriage discussed 25
—— Of suitor to another woman 16
—— Of widow—Return of dowry 12
—— Order of commoners' wives determines status 43
Messenger—Father may act in dowry negotiations 8
Minor—Torts committed—liability of guardian 3, 4

N.

Native Chief's enquiry—Privilege 29
"Native Law"—meaning of 17
Neglect of suitor—Rights in earnest cattle 16
Negligence of minor 3, 4
Nomination of wives confined to Chiefs 43
"Nqoma" stock—Owner may claim from purchaser 28
"Nqutu" beast 38

O.

Ownership—Earnest cattle 16
—— Evidence—Spoliation 27
—— "Nqoma" stock 28

P.

Parents—Liability for torts of minors 3, 4
Parties resident on private farms 40
Paternity—Woman's evidence 37
Plea—Failure to file 26
Pledge—Claim before settlement of debt premature 36
Pondo Custom 10, 28, 29
Pondomise Custom 11
Practice 26, 27, 33, 34, 36, 37
Pregnancy—Discovery after marriage by husband 22
Presumption of marriage 24
Privilege—Native Chief's enquiry 29
Proclamation—No. 140 of 1885 19
—— No. 142 of 1910 ..... 5, 19
—— No. 145 of 1923 ..... 26, 33, 34
Property appertaining to estate may not be removed by heir 21
Purchaser of "nqoma" stock 28

Q.

"Qadi" house—Claim of Right-hand House 11, 42

R.

Ranking of wives 41, 42, 43
Record—Production—Inadmissible evidence 37
Refusal of woman to live with husband and tender of dowry cattle dissolves marriage 22
Reimbursement of dowry 9, 11, 42
Rejection—Marriage of suitor to another woman 16
Remarriage of widow—Return of first dowry 12
Rescission of judgment 26
Res Judicata—Compromise of judgment 34
Right-hand House—Payment of dowry for "Qadi" of Great House 42

S.

Seduction—Wife's pregnancy discovered after marriage 22
—— Baca Custom 38
Services of wife—Deductions from dowry 10

PAGE

"SIDWANGU" BEAST 38
SLANDER—Imputation of witchcraft 30
SON—Disinherison 19
SON—Torts—Liability of guardian 3, 4
Spoliation 27
STALE CLAIM 19
STATEMENT OF PROPERTY in "junior houses" may be demanded 9
STATUS—Children born while mother under "teleka" 6
—— Commoner's wives 43
—— Fifth wife 42
STOCK—Injury by minors 3, 4
SUCCESSION—Son of "Qadi" to Great House 41
SUITOR'S NEGLECT 16

T.

TELEKA—Rights in children born while mother under "teleka" 6
TORT—Liability of guardian or parent 3, 4

W.

WIDOW incompetent to give daughters in marriage 39
—— Must consult husband's people 39
—— Remarriage—Return of first dowry 12
—— Rights in regard to estate property 21, 40
WIFE—Children born to wife under "teleka" 6
—— Father not liable for dowry of son's second wife 8
—— Pre-nuptial pregnancy discovered after marriage 22
—— "Qadi" to Great House 41
—— Ranking of 41, 42, 43
—— Services—Deductions from dowry 10
WILFUL INJURY—Tort by minor—Liability of guardian 3, 4
WITCHCRAFT—Imputation of—slander 30
WOMAN—Evidence in seduction cases 37
—— Refusal to live with her husband and tender of dowry dissolves marriage 22
WOMEN—Fees paid to by seducer after elopement with girl of their kraal .. 38
WRIT OF EXECUTION—Setting aside of 34

NATIVE APPEAL COURT REPORTS.

1928, March 13. Butterworth.

ADAM DINGISWAYO *vs.* ALFRED MATANDA.
(Nqamakwe Case.)

Before W. T. Welsh, C.M., President, with F. H. Brownlee and G. D. S. Campbell as Assessors.

Adultery—Damages—Measure of when not accompanied by Pregnancy—Fingo Custom.

JUDGMENT.

By President: On the question of adultery there is sufficient evidence to support the Magistrate's finding with which this Court is therefore not prepared to interfere.

There appears to be diversity of practice in the Courts of Fingoland in the assessment of damages in actions for adultery, and the matter having been referred to the Native Assessors they state that according to Fingo Custom the fine imposable for adultery is three head of cattle.

This Court is of opinion that it is desirable to bring these differing practices into line and to lay down what damages should ordinarily be awarded.

The measure of damages stated by the Assessors to be in accord with Fingo Custom is, in the opinion of this Court, reasonable and is in conformity with the practice observed generally by the tribes of these Territories. The appeal will accordingly be allowed with costs and the Magistrate's judgment in favour of Plaintiff will be reduced from five to three head of cattle or their value £5 each and costs.

It must be understood that this ruling refers only to cases of adultery not followed by pregnancy, and is not intended to interfere with Magisterial discretion in assessing damages when very special circumstances are present.

1928, November 7. Umtata.

MDIYA NELI *vs.* QIQO WAYITI.

(Engcobo Case.)

Before J. Mould Young, A.C.M., President with G. M. B. Whitfield and F. N. Doran as Assessors.

Damages—Adulterer entitled to claim damages for assault committed on him when found in the act of adultery.

JUDGMENT.

By President: The assault in respect of which the damages are claimed was committed whilst the Respondent was caught in the act of adultery with the Appellant's wife, and the injuries inflicted were, according to the medical and other testimony, of a more or less serious nature. The Magistrate has found that Appellant has exceeded his rights and has awarded him the sum of £10 as damages, the amount paid by him for medical treatment.

In the case of Sipoxo Hashi *versus* Bunxa Dumezweni and another (4, N.A.C., 6) it was held that the adulterer was entitled to damages for an assault committed by the husband.

The amount of damages awarded has not been appealed against.

The appeal is dismissed with costs.

1928, November 30. Lusikisiki.

MZIMNI NDABANGAYE *vs.* YONI GOVU.

(Bizana Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway and F. C. Pinkerton as Assessors.

Adultery—Insufficient evidence to sustain action for damages for.

JUDGMENT.

By President: There is no corroboration whatever of the evidence of Plaintiff and his wife—his only witness. The Plaintiff alleges that he saw his wife and Defendant lie down together and subsequently struggled with and then chased the Defendant to his kraal, but did not raise an alarm of any sort. There are discrepancies surrounding the stick incident in the hut, and regarding the loin cloth, the ownership of which, as well as that of the stick, the Defendant denies.

No report was made to the headman and the usual demand for damages, if made, is not supported by any witness.

In the opinion of this Court the circumstances disclosed do not justify the acceptance of the uncorroborated testimony of the Plaintiff and his wife.

The appeal is allowed with costs and judgment altered to one for the Defendant with costs.

1928, November 6. Umtata.

THOMAS SININGWA *vs.* PAKAMILE PETSE and Others.

(Engcobo Case.)

Before J. Mould Young, A.C.M., President, with G. M. B. Whitfield and F. N. Doran as Assessors.

Damages—Owner entitled to damages for wilful injury done to a cow on commonage in Native location.

JUDGMENT.

By President: In this case the Plaintiff claimed from the Defendants the sum of £10 as damages and alleged that the Defendants, Pakamile Petse, Tami Soldati, Kiti Kenqe and Bunga Kenqe acting in concert did wrongfully, unlawfully and violently beat certain dun cow, heavy in calf, Plaintiff's property, and did inflict injuries which caused its death.

The Defendants are minors and are sued assisted by their guardians Jeremiah Petse, Wilson Soldati, Albert Kenqe and Edmund Kenqe.

The Defendants Tami Soldati and Wilson Soldati consented to judgment. The other Defendants, whilst admitting that they drove certain cattle, amongst which was Plaintiff's cow, deny that they did any act which caused injury to it or in any way contributed towards its death and say that it died from natural causes.

It is abundantly clear from the evidence led that the defendants Pakamile Petse, Tami Soldati, Kiti Kenqe and Bunga Kenqe did beat the cow and drive it for a considerable distance and that it died either that night or the following morning. There is, however, no direct evidence as to the cause of death nor is there any proof that death was due to the driving and beating by Defendants.

In the opinion of this Court, however, the Defendants by beating and driving the Plaintiff's cow whilst it was on the commonage were acting wrongfully and in reckless disregard of the rights of the owner of the animal who is entitled therefore to some measure of damages, which this Court assesses at £1.

The appeal is allowed with costs and the Magistrate's judgment altered to judgment for Plaintiff for £1 and costs as against the Defendants jointly and severally, the one paying the others to be absolved.

1928, November 9. Umtata.

REGE SKENJANA AND ANOTHER *vs.* KAMBI GECA.

(Tsolo Case.)

Before J. Mould Young, A.C.M., President, with G. M. B. Whitfield and F. N. Doran as Assessors.

Tort—Death of or injury to animal caused by negligence or wrongful act of herd—Liability of father for torts of son.

JUDGMENT.

By President: In this case the Magistrate found that the 1st Defendant, a boy of about twelve years of age, drove certain cattle the property of the Plaintiff, out of an unfenced garden of the 2nd Defendant through a donga, that he set two dogs belonging to the 2nd Defendant at the cattle and beat them with a stick and that one of the cattle, a cow, while being driven through the donga had its leg broken and that it subsequently died as a result of this injury. He also found that the action of the 1st Defendant was wrongful and that the death of the cow was due to this wrongful act, and entered judgment for Plaintiff for £5 damages and costs.

An appeal is brought against this judgment on two grounds:—

> Firstly, that Plaintiff failed to prove that any actionable wrong had been committed by the 1st Defendant.
>
> Secondly, that in the circumstances the 2nd defendant was not legally liable for the alleged tort.

With regard to the first ground of appeal there is evidence to support the Magistrate's finding.

Dealing with the second ground the 1st Defendant has reached the age at which it is usual to entrust the care of cattle to Native boys and in the opinion of this Court he was old enough to foresee the consequences of his wrongful and negligent act, and, in the circumstances, the father is, under Native Law, responsible for the tort committed by him.

The appeal is dismissed with costs.

1928, July 11. Butterworth.

NGCAYICIBI *vs.* GADA MABOZA and Another.

(Idutywa Case.)

Before W. T. Welsh, C.M., President, with F. H. Brownlee and W. F. C. Trollip as Assessors.

Assault—Damages for—Assessment of.

JUDGMENT.

By President: This assault took place at a beer drink where such matters are of frequent occurrence, moreover the Plaintiff is not wholly free from blame.

Whatever the practice may be in actions for breach of contract Courts do not scrutinize too closely the evidence in support of damages for delict or tort and before this Court will interfere with the assessment made by the Magistrate it must be satisfied the damages awarded are grossly inadequate.

In all the circumstances this Court is not prepared to interfere and the appeal is dismissed with costs.

1928, April 2. Kokstad.

ROSA MALAMLELA *vs.* WHITE MALAMLELA

(Matatiele Case.)

Before J. Mould Young, A.C.M., President, with W. G. W. Wright and F. N. Doran as Assessors.

Children—Questions of custody and maintenance of minor children of marriage contracted according to the law of the Province, under provisions of Proclamation No. 142 *of* 1910, *do not fall within Magistrate's Court jurisdiction.*

JUDGMENT.

By President: In the opinion of this Court the appeal must fail. Questions concerning the custody of the minor children and maintenance are matters relating to or arising out of the marriage contracted according to the law of the Province, and, under the provisions of section *six* (2) of Proclamation No. 142 of 1910, do not fall within the jurisdiction of the Magistrate's Court.

The appeal is dismissed with costs.

1928, July 2. Umtata.

KHANA RANGANA *vs.* NKEBENKEBE MDINGI.

(Mqanduli Case.)

Before J. Mould Young, A.C.M., President, with W. J. Davidson and C. Ross-Norton as Assessors.

" Teleka "—Rights in children born whilst mother residing at her father's kraal under the custom of " ukuteleka " —Failure to pay " teleka " fee does not affect status of children.

JUDGMENT.

By President: In this case the Appellant claimed:—

(*a*) Payment of two head of cattle or their value £12 being maintenance for a girl named Nomagudla and expenses in connection with her wedding outfit.

(*b*) A declaration that the Respondent has repudiated Notwayini, the eighth wife of the late Kama, and therefore has forfeited all rights in and to the following children born to her:—

(1) Nozinini, Nozingore (females) and Mtyaleni (male).

(2) Any children who may hereafter be born to the said Notwayini.

(3) Seven head of cattle paid by the late Kama as dowry for Notwayini.

In a previous case in which the parties were the same the present Respondent was declared the guardian of Nomagudla, Nozinini and Nozingore and awarded the dowry of Nomagudla, 9 head of cattle or their value £54.

There was no appeal against this decision.

In the present action the Defendant in the previous case claims a declaration in respect of the same girls on the ground that subsequent to that decision Notwayini, the mother of the girls Nomagudla, Nozinini and Nozingore, has been repudiated by the Respondent, Plaintiff in the previous action.

During the life time of Kama the Appellant " telekaed " Notwayini, his daughter, the eighth wife of Kama and she remained at his kraal up to the time of her husband's death.

Whilst Notwayini resided at her father's kraal under " teleka " she was visited by her husband, had issue by him namely, Nozinini, Nozingore and a boy who died.

After her husband's death she gave birth to two male children by some other man.

The marriage between Notwayini and Kama was dissolved on Kama's death and any children born during the subsistence of that marriage belong to the heir of the late Kama, and the fact that Kama's heir failed to pay the " teleka " fee demanded cannot affect the status of these children.

The Appellant therefore is not entitled to the declaration in respect of the girls Nozinini and Nozingore.

With regard to the Appellant's claim for reimbursement of expenses connected with the marriage of the girl Nomagudla it is quite clear from the evidence of Hlakanyana, the co-Defendant in the previous case, that Appellant did not defray these expenses but that they were paid by him.

In all these circumstances, the Appellant has failed to establish his claim in respect of any rights to the two girls and to reimbursement of the wedding expenses of the girl Nomagudla.

The appeal is dismissed with costs.

1928, March 16. Umtata.

QASEKONYA *vs.* MSUZO.

(Umtata Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson and H. E. F. White as Assessors.

Dowry—Heir of elder son held not entitled to claim refund from the dowry paid for the daughter of a younger son of the same house when the dowry for the younger son's marriage has been provided by the father during his lifetime.

JUDGMENT.

By President: Plaintiff, now Respondent, sued the Defendant, now Appellant, for 10 head of cattle or their value £50.

It appears that one Nanele had two sons named Nenzi and Payi respectively. The Respondent is the heir of the Great House of Nenzi and Appellant is the eldest son in the house of Payi. Nenzi and Payi are brothers in the same house. During his lifetime Nanele paid the dowry for Payi's Great Wife and Respondent being Nanele's heir claimed the dowry paid for the eldest daughter of Payi's first wife as a refund of the dowry paid for her by Nanele.

On the facts the Magistrate found for the Plaintiff and although differing from the judgment in the case of Mabilwana *versus* Ngubombini (heard at Umtata in July, 1923, not reported) as a correct statement of the Native Custom, felt bound to follow it and accordingly gave judgment for the Plaintiff for 5 head of cattle with costs. Against this judgment the Defendant has appealed.

The circumstances of this case and the statement of Native Law and Custom in the case of Mabilwana *versus* Ngubombini having been placed before the Native Assessors Alec Mgudlwa, Samuel Majeke, Luswazi Holomisa, Paul Nkala and Bushula Makalima, they state that when a father pays

dowry for two sons of the same house it is contrary to Native Custom for the heir of the elder son after his grandfather's death to claim a refund of this dowry out of the dowry paid for the first daughter of the younger son.

This expression of opinion is inconsistent with that given by the Native Assessors in the case quoted above.

After careful consideration and consultation of the authorities, this Court has come to the conclusion that the statement of custom made in the case of Mabilwana *versus* Ngubombini (supra) is not in accord with the general principles of Native Custom and should not be followed.

The Native Assessors who have been consulted in the present case are men of wide experience and knowledge and are recognized as leading authorities on Native law and custom, and, although most reluctant to overrule the opinion of the Assessors given in the case referred to, this Court is prepared to accept the statement now made as being more in harmony with Native marriage customs applicable to this question, for it recognizes the underlying principles that it is customary for the father to provide the dowry for a son's first wife.

In view of the acceptance of the statement of custom given by the Native Assessors it is unnecessary for this Court to pronounce upon the further issue raised.

The appeal will be allowed with costs and the judgment in the Court below altered to one for the Defendant with costs.

It may be well to add that in giving their opinion upon the facts presented in this case the Assessors stated that it would be competent for an elder brother paying dowry for his younger brother in the same house, to claim refund of the dowry paid out of the dowry received for the latter's first daughter. It may be possible that the Assessors in the case of Mabilwana *versus* Ngubombini had such a case in mind when giving their opinion of custom.

1928, April 2. Kokstad.

MSWELI BADUZA *vs.* KALOLO DLOVA and Another.
(Mount Fletcher Case.)

Before J. Mould Young, A.C.M., President, with F. E. H. Guthrie and F. N. Doran as Assessors.

Dowry—Father not liable to pay the dowry for the son's second wife but may act as son's messenger in marriage negotiations—Hlubi Custom.

JUDGMENT.

By President: This Court is satisfied that the Respondent, Dlova, was only acting as the messenger of his son Kalolo and that he at no time agreed to hold himself personally

liable for the dowry of Kalolo. He had paid the dowry of Kalolo's first wife and it would have been an unusual thing and not in accordance with general practice for him to have found the dowry for a second wife.

It is quite clear from the evidence of the Appellant and his witnesses that the attitude of the Respondent from the outset of the negotiations was that having found his son a wife, he was not liable and that whatever he did was done as his absent son's representative.

The appeal is dismissed with costs.

1928, April 3. Kokstad.

TANDANI SICWEBU *vs.* MZWAMANDLA SICWEBU.

(Mount Fletcher Case.)

Before J. Mould Young, A.C.M., President, with F. E. H. Guthrie and F. N. Doran as Assessors.

Dowry—Right of "Great House" to be reimbursed from dowry of eldest daughter of "Right Hand" House—Hlubi custom—Heir of "Great House" entitled to call upon representatives of other houses for a full statement to satisfy himself if estate is properly apportioned.

JUDGMENT.

By President: The Appellant is the eldest son of the Great House and the Respondent the eldest son of the Right Hand House of the late Swartland Sicwebu.

Appellant claimed:—

(1) The dowry paid for Ndundu, the eldest daughter of the Right Hand House of Swartland.

(2) A declaration that he is the owner of all sheep forming part of the estate of Swartland now running in Basutoland.

(3) He alleged that when his father married his second wife, Respondent's mother, the dowry paid for her was taken from the property of the Great House and, that in accordance with custom, the Great House is entitled to the dowry of the eldest daughter of the Right Hand House.

(4) During his lifetime Swartland removed to Basutoland certain 300 sheep and that these sheep are the property of the Great House of which he is the heir.

The Respondent denied that under Hlubi custom the Great House was entitled to the dowry of the eldest daughter of the Right Hand House. He admitted that 300 head of small stock were taken to Basutoland but maintained that this stock was the property of the Right Hand House.

With regard to the first claim it has been held by this Court to be universal practice that the dowry of the eldest daughter of the second or Right Hand House goes to the Great House to reimburse that house for the dowry paid for the Right Hand Wife.

In connection with the second claim it is common cause that during his lifetime Swartland had more than one kraal, that he was a wealthy man and had stock running at all these kraals. The Respondent states that the sheep removed to Basutoland bore the earmark of the Right Hand House. Appellant is not in a position to deny this. He admits that he knows very little about his late father's affairs and has a very hazy notion of what he is entitled to. He says that during his father's lifetime he was given 80 sheep to look after and that other sheep were left with Respondent and his mother. This would seem to indicate that Swartland made an allotment of his property to the various houses. This Court is not satisfied that Appellant has proved his claim to the 300 sheep, but he being the eldest son of the principal house of the late Swartland is entitled to call upon the representatives of the other houses for a statement of the property belonging or appertaining to each house in order to enable him to satisfy himself that the estate has been properly apportioned.

Under these circumstances the appeal is allowed with costs and the Magistrate's judgment altered to judgment for Plaintiff for 17 head of cattle and one horse or their value £90 being the dowry admitted by the Defendant as having been paid for his sister Ndundu. Absolution from the instance with regard to the claim for 300 sheep. Defendant to pay costs.

1928, April 11. Lusikisiki.

SIYOTYWA NGIDI *vs.* NGCINGOLO CITELO.
(Tabankulu Case.)

Before J. Mould Young, A.C.M., President with O. M. Blakeway and F. C. Pinkerton as Assessors.

Dowry—Death of husband shortly after marriage—Deductions—Services of woman.

JUDGMENT.

By President: In this case the Magistrate found that Mqondwa died about ten days after his marriage to Bonjiswa, the Defendant's sister, and that Bonjiswa was not pregnant at the time of her husband's death, and ordered the return of all the dowry paid. It has not been shown to the satisfaction of this Court that he erred in his finding on the facts.

With regard to the question of the number of cattle returnable it was decided in the case of Nyolwa *versus* Ngalombini Dliseka, from the District of Tabankulu (3, N.A.C. 59) that where the husband dies within a short period after the marriage the dowry paid for the wife must be returned less one beast for the services of the woman.

The appeal is dismissed with costs, but the Magistrate's judgment will be amended to read judgment for the Plaintiff for five head of cattle or £25 and costs.

1928, July 4. Umtata.

MAKOSONKE NOTSETE *vs.* LUTOLI NOTSETE.

(Tsolo Case.)

Before J. Mould Young, A.C.M., President, with W. J. Davidson and R. H. Wilson as Assessors.

Dowry—Re-imbursement for dowry paid out—Pondomisi Custom—"Great House" entitled to dowry of eldest daughter only of "Right Hand House"—Thereafter "Right Hand House" taking the same privilege in respect of junior or "Qadi" houses appertaining to it.

JUDGMENT.

By President: It is abundantly clear from the whole of the evidence that Mamtolo was the Right Hand Wife of the late Notsete, and it is common cause that Plaintiff is the son of a woman named Manyandube by Notsete. It is also common cause that the cattle claimed are the dowry of Mamtolo's second daughter and that the dowry of the first daughter was received by Defendant, the eldest son of Notsete's Great House, to replace the dowry paid by that house for Manyandube.

During the hearing of the appeal it was admitted that Plaintiff is the heir of the Right Hand House. That being so he is entitled to the cattle claimed. He alleges that his mother was married by Notsete as the Right Hand Wife and that on her death Mamtolo was married and put into her hut. The parties are Pondomisi and this was quite in accordance with Pondomisi Custom as stated in the case of Nlangweni *versus* Mkwabane (1 N.A.C. 381).

The appeal is dismissed with costs.

1928, August 24. Kokstad.

AMOS SISILANA *vs.* MBUSO GALO.
(Matatiele Case.)

Before W. T. Welsh, C.M., President, with W. G. W. Wright and R. D. H. Barry as Assessors.

Dowry—Return of—Death of Husband—Remarriage of widow—Dowry paid in respect of first marriage must be returned to heir of former husband less one beast for each child born of the marriage—Contrary to Native Custom for a man to hold two dowries for one woman.

JUDGMENT.

By President: The Appellant, the Plaintiff in the Court below, claimed from the Respondent the return of the dowry paid by his son Damini in respect of the Defendant's sister Nalina on the ground that, after the death of Damini, Nalina contracted a second marriage with one Mbuzana and that the latter had paid dowry for her to the Respondent.

The Respondent denied that he had received any dowry from Mbuzana and the Magistrate absolved him from the instance holding that the Appellant had not discharged the onus of proving that Mbuzana had paid dowry for Nalina.

In the opinion of this Court the Magistrate has failed to attach sufficient importance to the evidence led on behalf of the Appellant. Not only is there evidence of repeated admissions by the Respondent that he received the dowry but there is also evidence that the animals constituting this dowry were actually seen in the Respondent's possession. Moreover the evidence has also been adduced to show from whom Mbuzana obtained the filly and the ox with the white flanks. This evidence has not been rebutted.

It is a matter of common knowledge that even in cases of Christian marriages between Natives of the class to which the parties belong dowry is paid and in the opinion of this Court the probabilities support the Appellant's contention.

This Court is in as good a position as the Magistrate to judge the value of the evidence recorded by another judicial officer.

In all the circumstances this Court is satisfied that the Respondent has received a second dowry for Nalina and that he is not entitled to retain both dowries.

The Native Assessors from Matatiele, Mount Frere, Umzimkulu, Mount Fletcher and Mount Ayliff having been consulted state that according to Native Custom in these districts when a widow remarries and dowry is paid for her by her second husband the heir of the former husband is entitled to recover the previous dowry paid. This is, however, subject to the usual deduction of one beast for each child born of the marriage.

The appeal is allowed with costs, and of the fourteen cattle paid the Appellant is entitled to the return of thirteen head of cattle or their value at £5 each with costs in the Court below.

1928, December 3. Kokstad.

MXOLI NYOKANA *vs.* KUTWANA NKWALI.

(Matatiele Case.)

Before W. T. Welsh, C.M., President, with H. E. Grant and R. Welsh as Assessors.

Hlubi Custom—" Dikazi "—Amount of dowry payable for—What is a " dikazi ".

JUDGMENT.

By President: In this case the Defendant, now Respondent and Cross-appellant, married one Mlibaziso some twenty-one years ago and, in the absence of the father, the Plaintiff—now Appellant and Cross-respondent—paid to her brother a dowry of eight cattle. It appears that Mlibaziso was a cripple and at the time of her marriage had had a child by a stranger. The Plaintiff, after an absence of twenty-one years, has returned and claims from Defendant seventeen cattle and one horse being the balance of a full dowry due according to Hlubi Custom to which tribe the parties belong. The Defendant denies liability and pleads a tender of two additional cattle prior to issue of summons. The Magistrate gave judgment for the Plaintiff for four cattle and one horse with costs from date of a previous tender which had been refused and ordered the Defendant to pay costs prior to issue of summons.

The Plaintiff has appealed on the ground that he is entitled to the full Hlubi dowry and the Defendant has cross-appealed on the ground that his tender of two additional cattle was sufficient and should have been accepted.

The Native Assessors having been consulted state:—" That according to Hlubi Custom the full dowry for a ' Dikazi ' is ten cattle, and that a girl who has had one child by a stranger is a ' Dikazi ' ".

The Plaintiff would not in the circumstances disclosed appear to be entitled to much consideration and in view of the statement of Hlubi Custom this Court is of opinion that the Magistrate has erred.

The appeal will accordingly be dismissed with costs. The cross-appeal will be allowed with costs and judgment in the Court below altered to one for the Plaintiff for two cattle or their value at £5 each with costs up to date of the Defendant's tender. Costs subsequent thereto to be paid by the Plaintiff.

1928, December 24. Kokstad.

Pub. to 1938 (T.N.) 14.

SENSETA CEBE *vs.* MAKOSONKE SILIMELA.

(Mount Frere Case.)

Before W. T. Welsh, C.M., President, with F. H. Guthrie and H. E. Grant as Assessors.

JUDGMENT.

Dowry—Hlubi Custom—Balance of dowry due according to tribal custom may be sued for where subsequent to the customary Native marriage and part payment of such dowry a marriage by Christian rites is contracted by the parties without the knowledge or consent of the woman's guardian—Party residing permanently in a Hlubi location and marrying a Hlubi girl is subject to Hlubi Law and Custom.

By President: In this case the Plaintiff, now Respondent, claimed from the Defendant, now Appellant, 17 cattle, 1 horse and 20 sheep alleging that these are the balance of dowry due to him according to Hlubi Custom on account of the marriage of his aunt Nonini to the Defendant in 1906.

In his particulars of claim the Plaintiff alleged:—

1. That Plaintiff is a Hlubi and Defendant is a Hlubi by custom having resided in a Hlubi location for many years and is therefore governed by the said Hlubi tribe's customs.
2. That Plaintiff is heir of the late Mankahla.
3. That a marriage was arranged between Defendant and Plaintiff's aunt Nonini in or about 1906 and Defendant paid on account of dowry 3 head of cattle leaving a balance according to custom and agreement of 17 cattle, 1 horse and 20 sheep.
4. That the said Nonini lived with Defendant many years as his wife according to Native Custom.
5. That in or about 1920 defendant, unbeknown to Plaintiff, married the said Nonini according to Christian rites before one Reuben Potwana after the birth of 6 children.

That Plaintiff has repeatedly demanded the balance of dowry due—17 cattle, 1 horse and 20 sheep—but Defendant neglects or refuses to pay same.

The Defendant admitted paragraph 2 of the summons, but denied that he is a Hlubi and states that he is a Pondomisi and follows and is governed by the customs of that tribe.

In regard to paragraphs 3, 4, 5 and 6 of the summons he states that he married Nonini according to Native Custom about the year 1906 and paid in all 6 head of cattle as dowry and that on the 20th May, 1919, with the consent of her brother the late Citindlu Silimela, at that time her guardian, he married Nonini by Christian rites of which marriage the

Plaintiff was fully aware. He further denies that at any time he specially promised or agreed to pay further dowry. In reply to these pleadings the Plaintiff denied that Citindlu Silimela was Nonini's guardian.

The Magistrate came to the conclusion (*a*) that the Defendant is bound by Hlubi Custom, (*b*) that the dowry claimed is still due in accordance with that custom, and, (*c*) that the obligation thus incurred was not set aside either automatically by the Christian marriage or by any agreement on the part of the Plaintiff and that the Defendant is therefore liable for the balance of the dowry claimed which was by consent during the proceedings reduced from seventeen cattle to fourteen.

Prior to his marriage in 1906 the Defendant had resided in a Hlubi location for four years, he married into a Hlubi family there and has continued to reside in the same location ever since.

The contention that he is not subject to Hlubi Custom is, therefore, in the opinion of this Court, untenable.

It was held by this Court in the cases of Nozozo and Joni *vs.* Mahlala (3, N.A.C. 70), Luto Njeugaye *vs.* Ben Mbola (3, N.A.C. 76), and V. Sono *vs.* G. Mahlaka (4, N.A.C. 75), that agreements or promises to pay dowry in contemplation of marriage are enforceable even though the marriage may be celebrated according to Christian or civil rites.

In the course of the proceedings the Plaintiff admitted that there was no express agreement as to the dowry to be paid and confined his claim to the alternative allegation that the balance was due to him in accordance with Hlubi Custom, under which a full dowry consists of 20 cattle, 1 horse and 20 sheep.

It hardly admits of doubt that at the time of marriage the Defendant was well aware that according to Hlubi Custom, which must apply in the absence of a specific agreement to the contrary, he bound himself to pay dowry according to the customs and usages of the tribe with which he had in every way associated himself, and it is highly improbable that Mankahla, Nonini's guardian, whould have permitted the Native Custom marriage to proceed without such being the case.

The Plaintiff alleges that he has made repeated attempts to obtain the balance of the dowry claimed to be due to him and there is nothing to show, nor has it been pleaded that he or Mankahla in any way waived their rights thereto, or that the delay in any way compromised Plaintiff's claim.

As already stated this Court has decided in several cases that agreements to pay dowry can be enforced where the marriage was entered into according to Christian or civil rites, and there is, in the opinion of this Court, no reason why the same principle should not apply in cases where subsequent to the customary Native marriage and part payment of the dowry due according to tribal custom a Christian or civil marriage is contracted without the knowledge of the

woman's guardian. There can be no question that in this case a full Hlubi dowry was in contemplation between the parties and in the opinion of this Court the Defendant cannot escape liability by having surreptitiously entered into a Christian marriage.

This Court has accordingly come to the conclusion that the Magistrate was correct in holding the Defendant liable and the appeal is dismissed with costs.

1928, August 23. Kokstad.

ELIPHA AND ANOTHER *vs.* MBALISO MBULAWA.

(Matatiele Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright and R. D. H. Barry as Assessors.

Engagement cattle—Rights in when marriage not consummated owing to suitor's neglect which extended over lenghty period—Marriage of suitor to another woman constitutes rejection of former fiancee.

JUDGMENT.

By President: This Court is satisfied that the marriage between the first Defendant and the Plaintiff's daughter Nomabula was not consummated owing to the first Defendant's neglect which extended over a lengthy period. The Magistrate has found that the additional two cattle agreed to have not been paid and this Court, in all the circumstances, sees no reason to differ from that finding. The first Defendant has now married a woman other than Nomabula according to Christian rites and this constitutes a definite rejection of the latter.

The Plaintiff is therefore entitled to retain the cattle he received from the Defendants in anticipation of the first Defendant's marriage with Nomabula together with their increase.

The appeal is dismissed with costs.

1928, March 12. Butterworth.

LIZZIE MAGCOBA *vs.* ALEX MAGCOBA.

(Butterworth Case.)

Before W. T. Welsh, C.M., President, with G. D. S. Campbell and A. L. Barrett as Assessors.

Inheritance—Illegitimate son born to a widow of a marriage by Christian rites after the death of her husband held not to inherit his mother's late husband's estate—Meaning of "Native Law" in Proclamation No. 142 *of* 1910.

JUDGMENT.

By President: In this action Lizzie Magcoba Plaintiff in the Court below, and now Appellant, seeks a declaration of rights declaring her infant son to be the heir of her late husband Sampson Magcoba, as against one Alex Magcoba a nephew of the deceased.

It is common cause:—

(1) That Sampson and Lizzie Magcoba were married according to Christian rites.

(2) That Sampson died some ten years ago.

(3) That the infant was born at the kraal of the late Sampson Magcoba.

(4) That the mother had resided there ever since Sampson's death.

The Appellant relies upon Proclamation No. 142 of 1910 as amended by Proclamation No. 127 of 1918.

The Proclamation applies, omitting words having no bearing upon the present case, to every marriage between Natives and to all questions of divorce, separation, inheritance or rights to property arising out of any such marriage, provided that nothing in the Proclamation shall affect any legal right arising from a marriage in community of property contracted before promulgation of the Proclamation.

Section *eight* of the Proclamation lays down, with certain exceptions, that upon the decease of any Native to whom the provisions of the Proclamation apply his estate shall devolve and be administered according to Native Law. In this respect the Proclamation draws no distinction between civil or Christian marriage and marriage according to Native Custom.

Up to this point there is much force in the arguments of Appellant, but it is important to bear in mind that "Native Law" for the purposes of the Proclamation means "Native usages and customs as practised by Natives and recognized and administered by the Courts of the Transkeian Territories."

No decision has been quoted in which this Court has held that the child of a widow of a civil marriage born many years after her husband's death is entitled to inherit his estate.

It is thus apparent that the last stage of the Appellant's argument is incomplete; and it remains for the Court to decide in the present action whether the Native Custom which would be applied to the irregular offspring of a widow by Native Custom shall be similarly applied in the case of civil marriage.

In the recent case of Dumalitshona *versus* Mraji heard at Umtata in November, 1927 (5, N.A.C. 168) this Court reluctantly reaffirmed in the case of a marriage by Native Custom the validity of an admittedly objectionable practice for reasons fully set out in the judgment.

Both the legislature and the Courts appear to have been influenced by the consideration that more harm than good is likely to be caused by the disturbance of immemorial custom, in advance of the sentiment and the natural development of the people concerned.

It does not follow that undesirable features of Native Custom should be grafted upon Christian or Civilized practices towards which many of these people now aspire.

A civil marriage is absolutely and completely dissolved by the death of one of the spouses, and when a marriage is thus dissolved the immediate effect is to put an end to all its legal consequences.

This Court is not prepared to recognize a practice which would encourage the widow of a Christian marriage, for the sake of bearing an heir to her deceased husband, to indulge in illicit intercourse under circumstances repugnant to the moral principles of Christian marriage and which would perpetuate in certain respects the consequences of a contract which has been absolutely and completely dissolved by her husband's death.

It is immaterial for the purposes of this judgment whether the Christian marriage was, or was not, accompanied by the payment of dowry.

The Magistrate's judgment is sustained and the appeal is dismissed with costs.

1928, November 8. Umtata.

JOKOQELA NOHELE *vs.* BUSIKA NOHELE.

(Engcobo Case.)

Before J. Mould Young, A.C.M., President, with G. M. B. Whitfield and F. N. Doran as Assessors.

Estate—Disinherison of heir by father—Mode of disinherison—Right of father to revoke declaration and power of chief to rescind order—Jurisdiction of Magistrate to grant order of disinherison—Section twenty-two *of Proclamation No.* 140 *of* 1885.

JUDGMENT.

By President: In this case the Appellant, Plaintiff in the Magistrates's Court, claimed:—

1. Cancellation of an order of the Magistrate of Engcobo disinheriting him.
2. A declaration that he is the eldest son and heir of the Great House of the late Nohele.

He alleged that the order was made in his absence, that he was entirely ignorant of it until he was met with it in certain litigation in which he claimed from Respondent the property appertaining to the Great House and that as the usual formalities for obtaining the disinherison order were not followed the order of the Magistrate was irregular and of no effect. The records of several cases were put in by consent of parties and from one of these, Case No. 162 of 1910, it appears that on the 26th April, 1910, and before the taking effect of Proclamation No. 142 of 1910, Nohele, Appellant's father, obtained an order by the Magistrate declaring Appellant to be disinherited and removed from his position as heir. When this order was made Appellant was in default.

On the 29th April, 1910, a document in the following terms was issued by the Magistrate:—

> "In the matter between Nohele, Plaintiff *versus* Jokoqela, Defendant, on this 29th day of April, 1910, before me, T. W. C. Norton, Esquire, Resident Magistrate of Engcobo, appears Nohele of Kilili's ward and declares that he has placed Busika, a son of the Qadi to his Great House, as heir to the Great House in the place of Jokoqela."

Nohele died some years ago and no steps were taken by Appellant during his lifetime to have the judgment of the 26th April, 1910, re-opened, nor has the Appellant done anything to have the order rescinded for a period of eighteen years and the question now is whether the order of the Magistrate was a valid one, and, if so, whether it can be set aside so many years after the death of Nohele and after the Respondent has had the benefits and responsibilities of the position of Great son and heir of the Great House.

In Native Law and Custom a father has a right to disinherit his son for sufficient cause and in doing so he has two courses open to him, namely:—

(1) By calling together the members of the family and in their presence and that of the son publicly declaring that he was disinheriting him and stating his reasons for so doing, thereafter reporting his action to the Chief or Headman or head of the clan. The son disinherited was entitled to an opportunity of disproving his father's allegations.

(2) By calling together the members of the family and, after consultation with them, requesting the Chief to summon the son to appear before him to show cause why he should not be disinherited. If the Chief was satisfied that the son had been guilty of conduct warranting his disinherison it was competent for him to make the order asked for. If the son after having been duly summoned failed to appear before the Chief it was competent for the order to be made in his absence.

There was no appeal against either the declaration of the father or the order of the Chief but the father had the right to revoke his declaration or apply to the Chief to rescind the order made by him.

In the present case the father, after consultation with the members of the family, applied to the Magistrate for an order disinheriting his son, the Appellant. The son was summoned to appear before the Magistrate to show cause why he should not be disinherited. This summons was served on his wife. On the day of the hearing of the application he did not appear before the Magistrate, who, after due enquiry, made an order asked for. By section *twenty-two* of Proclamation No. 140 of 1885 the Magistrate had jurisdiction to make such order. No attempt was made to attack that order, but, after the lapse of a period of eighteen years and some years after the death of the father, during which time the person substituted as an heir has been in undisturbed possession of the estate, the Appellant seeks to set it aside on the ground he was entirely ignorant of its existence until recently.

On the death of the father it was the Appellant's duty as eldest son of the Great House to assume control of the estate. He did not do so and has advanced no reason for not having done so and it is inconceivable that he would have remained in ignorance of the order. It must be presumed, therefore, that he was aware that the order had been made and that he acquiesced in it, and he cannot now after his father's death and the expiration of so many years seek to have it rescinded.

The appeal is dismissed with costs.

1928, November 9. Umtata

THOMAS ZIBUTI *vs.* NOYENKI ZIBUTI.
(Tsolo Case.)

Before J. Mould Young, A.C.M., President, with G. M. B. Whitfield and F. N. Doran as Assessors.

Estate—Rights of heir to remove estate property to his own kraal during the lifetime of his mother and against her wishes—Duty of heir to place his son at his late father's kraal to take care of estate property if he is not prepared to reside there himself.

JUDGMENT.

By President: The Plaintiff in this case, who is the widow of the late Zibuti, sues the Defendant, his eldest son and heir, for 20 head of cattle, 130 sheep, 20 goats, 3 horses, a plough and yokes. She alleges that the Defendant removed the property claimed, without her consent, from the kraal of the late Zibuti where she resides, and has left her destitute.

Defendant admits removing 12 head of cattle, 50 sheep, 6 goats and 4 horses and says these were taken with the knowledge and consent of Plaintiff.

The Magistrate ordered the Defendant to restore all the property in the estate to the kraal of the late Zibuti where the Plaintiff resides.

The appeal is brought on the ground that the Magistrate erred in awarding the Plaintiff the whole of the estate.

From the record it would appear that the Defendant preferred to leave 13 head of cattle and 30 sheep at his father's kraal. Plaintiff, in her evidence, states that she would be satisfied with an equal division of the property, but the Defendant was not prepared to accept this division.

At the request of the Appellant's attorney the question whether the heir has the right to remove the estate property from the kraal of his late father during the residence of his mother at the kraal was put to the Native Assessors.

They are not unanimous on the point. Three of them, namely, Bushula Makalima, Paul Nkala and Albert Ludidi, state that the heir cannot remove any of the estate property to his own kraal against his mother's wishes and that it is his duty if he is not prepared to live at his father's kraal to place his son there to take care of the property. The remaining Assessors, Sipendu Bacela and Petile Dalasile state that it is usual for a man during his lifetime to place his stock at vee kraals and other places and that there is nothing to prevent the heir in doing likewise after consultation with his mother.

The opinion expressed by the majority of the Assessors is in conformity with recent decisions of this Court and is accepted as a correct statement of Native Law on the subject.

The appeal is dismissed with costs.

1928, November 8. Umtata.

NOVIWA NONKANGA *vs.* MATSHINI NONKANGA.

(St. Marks Case.)

Before J. Mould Young, A.C.M., President, with G. M. B. Whitfield and F. N. Doran as Assessors.

Marriage—Dissolution of—Refusal by woman to live with her husband and tender of dowry sufficient to dissolve marriage.

JUDGMENT.

By President: In the opinion of this Court the Magistrate erred in not accepting the evidence of the woman and her brother. It is abundantly clear that she has repeatedly left her husband and returned to her brother's kraal. It is also clear that she refuses to live with him any longer and that a sufficient tender of the dowry has been made.

In the case of Mendziwe *versus* Lubalule (3, N.A.C. 170) it was held that the refusal of the woman to live with her husband and the tender of the dowry is sufficient to dissolve the marriage.

The appeal is allowed with costs and the Magistrate's judgment altered to judgment for plaintiff in the following terms:—

It is ordered that the marriage subsisting between the Plaintiff and Defendant be dissolved on payment to Defendant of two head of cattle or their value £10; Defendant to pay costs.

1928, November 10. Umtata.

GOGWANA SIBALALA *vs.* TSHETSHU TEMBA and Another.

(Umtata Case.)

Ref. to in 1937 (T.&N.) 121

Before W. T. Welsh, C.M., President, with G. M. B. Whitfield and F. N. Doran as Assessors.

Seduction—Husband's right of action for damages when wife's pregnancy discovered only after marriage.

JUDGMENT.

By President: In this case the Plaintiff, now Appellant, sued the Defendant, now Respondent, in an action wherein he alleged:—

(1) That in the last green mealie season he married one Nomayile by Native rites.

(2) That after the marriage he ascertained for the first time that the said Nomayile was pregnant.

(3) That neither he nor the woman's guardian was aware at the time of marriage that she was pregnant.

(4) That the Defendant at divers times and places and in Peter Jumba's location, Umtata District, during a period extending from the reaping season of the year 1927 to the scoffling season of the year 1928, had carnal intercourse with the said Nomayile as a result whereof she was rendered pregnant.

(5) That a child was born to the said Nomayile on or about the 24th July last, of which the Defendant was the father.

(6) That the child aforesaid died three days after birth.

(7) That by reason of the foregoing circumstances the Plaintiff suffered damages in the sum of £25 for which amount the Defendant is liable, and which notwithstanding demand he has neglected or refused to pay.

To this claim the Defendant excepted in the following terms:—

"Defendant excepts to Plaintiffs' summons as 'ex facie' the allegations set out in the particulars of claim, particularly in paragraphs 1, 2 and 4 thereof, no cause or right of action is disclosed in favour of the Plaintiff inasmuch as Plaintiff is claiming damages in respect of Defendant's alleged carnal intercourse with and impregnation of the woman called Nomayile before she, Nomayile, was or became the wife of the Plaintiff."

The Magistrate following the case of Philemon Ntloko *versus* Alfred Mbiza and Ano. (4, N.A.C. 328) sustained the exception and dismissed the summons with costs.

The Plaintiff has appealed on the ground that as he became aware of his wife's pre-nuptial pregnancy only after their marriage he was, as was decided in the case of Tshetsha *versus* Mavolontiya (1, N.A.C. 111) entitled to sue.

In the case of Tshetsha *versus* Mavolontiya (supra) which was followed in the case of Dayimani *versus* Mbovane Rebe (3, N.A.C. 248), it was laid down that when a girl is taken by a wedding party in marriage to a man and it is discovered after the dowry has been paid and the wedding party has left that she was pregnant when given in marriage the husband has a right of action against the seducer precisely the same as if pregnancy had been caused after the marriage but when a man concludes a marriage at the time knowing the girl is pregnant he has no such right of action.

In the opinion of this Court the ruling in the case of Philemon Ntloko *versus* Alfred Mbiza and Ano. (supra) which the Magistrate followed can be reconciled with that in case of Tshetsha *versus* Mavolontiya (supra) for in the former the Appellant went away to work during the course of his engagement and on his return found his fiancee pregnant by

another, but in spite of this he married her by Christian rites. His action against the seducer for damages failed and on appeal this Court consulted the Native Assessors who appear to have been influenced by the facts of the case then before them and made no attempt whatever to differentiate between it and the case where a man enters into a marriage ignorant of his wife's pregnancy.

It is significant that in the later case of Philemon Ntloko *versus* Alfred Mbiza and Ano. (4, N.A.C. 328) the Court in no way indicated that it overruled or even qualified the decision in the earlier cases referred to which laid down the circumstances under which according to Native Custom, an action can be maintained.

In the opinion of this Court the exception that the summons discloses no cause of action should not have been sustained.

The appeal will accordingly be allowed with costs, the Magistrate's ruling is set aside and the exception overruled with costs.

1928, August 28. Lusikisiki.

GAYA MKWANGWANA *vs.* MCIZWA MBENGANA.

(Bizana Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway and W. C. H. B. Garner as Assessors.

Marriage—Presumption of—Parties living together as man and wife for 15 years—Illegitimate child legitimized by subsequent payment of dowry and marriage of parents.

JUDGMENT.

By President: The fact that the Plaintiff and Mafenteni lived together as man and wife for a period of 15 years during which several children were born and that no claim whatever for damages was made by the father of the latter are important factors supporting the Plaintiff's contention.

The Magistrate after careful consideration of the evidence placed before him has found in favour of the marriage and this Court, in all the circumstances, is not prepared to say he has erred in his conclusions.

The Native Assessors having been consulted state that according to the Pondo Custom when a man seduces a girl, and has a child by her, if the father of the girl accepts the dowry and a marriage takes place a child is legitimized. This expression of the opinion is consistent with the decision in the case of Nyete Kolopene *versus* Setini Ngukumani (3, N.A.C. 122) and the principles of the common law of South Africa.

This even assuming that Nomatafula may have been born before the marriage of her parents the Defendant can have no claim to her.

The appeal will be dismissed with costs.

1929, February 5. Umtata.

MVANDABA JO *vs.* BANTYI GWE, N.O.

(St. Marks Case.)

Before J. Mould Young, A.C.M., President, with W. J. Davidson and W. C. H. Garner as Assessors.

Marriage—Proof of—Administration of an estate of marriage celebrated by Native Custom in the Transkeian Territories—Position if celebrated outside the Transkeian Territories.

JUDGMENT.

By President: The questions for decision in this case are:—

(1) Was there a marriage by Native Custom between the late Jadezweni Jo and Nobiza *alias* Noselem, Plaintiff's mother?

(2) If there was a marriage was it celebrated in the District of Stutterheim, in the Cape Province, or in the District of St. Marks, Tembuland?

(3) What are the consequences of a marriage by Native Custom (*a*) in the Cape Province, (*b*) Tembuland in the Transkeian Territories?

(4) Has the Plaintiff proved that the goats claimed are his property?

With regard to the first and second of these questions there is evidence, which the Magistrate believed, that a marriage was entered into by Native Custom between the late Jadezweni Jo and Nobiza and that this marriage was celebrated in the St. Mark's District, Tembuland. According to Tembu Custom the marriage ceremony takes place at the bridegroom's kraal. The evidence shows that although the late Jadezweni Jo was absent at work from time to time in the District of Stutterheim, he did not abandon his domicile in the St. Mark's District, and that he was actually in resident in that district when the marriage was celebrated.

Dealing with the third question the Court having found that the marriage took place in the Transkeian Territories, it is unnecessary for the purpose of this case to decide what the Plaintiffs status would be had the marriage been entered into in the District of Stutterheim. It seems clear, however, on the authority of Xasa *vs.* Xasa (7, E.D.C. 201) and Kula *vs.* Kula (1922, E.D.C. 92) that if he could prove that his father was a Native holding a certificate of citizenship or was living in a Native location his estate would be administered according to Native Law and Custom. In the Transkeian Territories the union would be a lawful one and Plaintiff would be regarded as legitimate and entitled to succeed to the estate.

This Court sees no reason to disturb the Magistrate's finding in respect to the ownership of the goats. The Defendant admits that he had certain goats, Plaintiff's property, in his possession and he has failed to account for these.

The appeal is dismissed with costs.

1928, March 13. Butterworth.

MANINI *vs.* KOMANI.

(Idutywa Case.)

Before W. T. Welsh, C.M., President, with F. H. Brownlee and G. D. S. Campbell as Assessors.

Practice and procedure—Default judgment—Application to rescind—Failure by Defendant to file his plea within time prescribed by Rule 1 (1), *Order XIV, Proclamation No.* 145 *of* 1923.

JUDGMENT.

By President: This is an appeal against the Magistrate's refusal to grant an application by the Defendant for a recission of a default judgment granted on the 19th November, 1927, and for leave to reopen and defend the action instituted against him by the Plaintiff.

Summons was issued on the 3rd November, 1927. Defendant entered appearance to defend on the 10th November, 1927, on which date it is admitted he was instructed by the Clerk of the Court to file his plea within seven days, which he failed to do. Judgment was entered against him on the 19th November, 1927.

Rule 1 (1), Order XIV of Proclamation No. 145 of 1923 requires that a plea must be filed within seven days of the date of entry of appearance to defend and as the Defendant failed to comply with this rule the Magistrate, in the opinion of this Court, correctly refused to grant the application.

The appeal is accordingly dismissed with costs.

1928, March 15. Umtata.

SHADRACK MBESHU *vs.* MBULAWA FODINI.

(Engcobo Case.)

Before W. T. Welsh, C.M., President, with R. H. Wilson and H. E. F. White as Assessors.

Damages—Fact of stock tendered as damages having been accepted by messenger on behalf of Plaintiff, binding on the latter.

JUDGMENT.

By President: In the opinion of this Court the acceptance by Fodini (Plaintiff's father) of the two head of cattle handed to and accepted by his messenger is, in the circumstances, binding upon the Plaintiff. Fodini had previously accepted three cattle from the Defendant on behalf of the Plaintiff's

claim for damages for adultery and the Defendant was therefore justified in paying any balance due to Fodini. While these two cattle were in Fodini's possession he states he wrote to the Plaintiff in connection with the quality of the two cattle he had accepted. It is thus clear that he continued to act for the Plaintiff after the letter of demand had been delivered.

The appeal is allowed with costs and judgment in the Court below altered to one for the Plaintiff for the two head of cattle paid.

Costs in the Court below to be paid by Plaintiff.

1928, April 2. Kokstad.

MJILA *vs.* MADLOLO and ANOTHER.

(Matatiele Case.)

Before J. Mould Young, A.C.M., President, with W. G. W. Wright and F. N. Doran as Assessors.

Spoliation—Plea of Ownership—Evidence of Ownership may be led where claimed in the summons.

JUDGMENT.

By President: In this case the Plaintiff sued the Defendants for the restoration of certain stock.

He alleged (1) That during the month of January, 1927, the Defendants wrongfully and unlawfully removed from his possession ten head of cattle, six horses, thirty-six sheep and ten goats his property or in his lawful possession; alternatively that the said ten head of cattle, six horses, thirty-six sheep and ten goats are his property and claimed the delivery thereof or payment of their value the sum of £125.

The first Defendant denied all the allegations in the Plaintiff's summons and the second Defendant pleaded that the stock claimed were his property and denied any act of spoliation.

On the plea being filed the alternative claim was withdrawn.

It was then contended by the Defendant's attorney that, notwithstanding the withdrawal of the alternative claim, it was competent for him to lead evidence of ownership. The Magistrate decided to hear evidence on the point, but reserved his ruling on the question of its admissibility. Certain evidence was led and the case postponed. At the adjourned hearing the Magistrate held that evidence of ownership was inadmissible.

Against this ruling an appeal has been brought.

In the opinion of this Court the Magistrate has erred. This case is distinguishable from the case of Ncelekazi *versus* Gqobi (5, N.A.C. 161) in that there is a clear allegation of ownership in paragraph (1) of the particulars of claim. It was therefore competent for the Defendants to plead ownership and lead evidence on that point.

The appeal is allowed with costs and the case returned to the Magistrate to be dealt with on its own merits.

1928, April 11. Lusikisiki.

MDLANGASO *vs.* SIGINTSOLO.

(Bizana Case.)

Before J. Mould Young, A.C.M., President, with O. M. Blakeway and F. C. Pinkerton as Assessors.

"*Nqoma*"—*Rights of owner—Owner may claim stock from* bona fide *purchaser—Pondo Custom.*

Facts.

Plaintiff claimed from Defendant the delivery of a certain dun heifer or its value £10.

In his particulars of claim he stated that he had left the heifer at the kraal of one Jako ka Sondombana under the "nqoma" custom, and he later found that the beast was at the kraal of Defendant.

Defendant pleaded a *bona fide* purchase for value from Jako without any knowledge of Plaintiff's rights and denied that Plaintiff had any right of action against him for the recovery of the heifer.

The Magistrate entered judgment for Plaintiff for the return of the heifer in question or its value £10. Defendant appealed.

Judgment.

By President: The only question raised by this appeal is whether the owner of "nqoma" stock which has been purchased in good faith can recover such stock from the purchaser.

At the request of the Respondent's Attorney the matter is submitted to the Pondo Assessors who state:—

> "Before annexation it was customary for the owner to sue the person to whom the stock had been Nqomaed and if judgment was given in his favour the animals sold were attached wherever found, but subsequent to annexation it has become the practice for the owner to sue the person in whose possession the stock is discovered."

In view of this statement the Magistrate's judgment is sustained and the appeal is dismissed with costs.

1928, August 29. Lusikisiki.

WAMPUKO *vs.* MAFLY.

(Ngqeleni Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway and E. W. Bowen as Assessors.

Defamation—Privilege—Justification—Statements impugning the action and good faith of an official headman in the conduct of his location, made before a Native chief at a normal inquiry affecting disputes between members of the tribe held to be privileged—Unconstitutional Native tribunal.

JUDGMENT.

By President: In this case Plaintiff sued the Defendant in the Magistrate's Court at Ngqeleni for £100 damages for defamation. The presiding Magistrate entered judgment for Plaintiff for £25 damages and costs, against which the Defendant has appealed.

The defamation was alleged to have taken place at the Great Place at Nyandeni before Victor Poto, the Chief of Western Pondoland, and to have consisted of statements there made impugning the actions and good faith of Plaintiff in the conduct of the location of which he is the official headman.

The statements made were admitted, and the present appeal based on the ground of (*a*) privilege, and (*b*) justification. It is not competent in the circumstances for this Court to consider the other issues raised in the pleadings.

In Makapan *versus* Khope (1916, A.D. 551) the power of an unconstitutional tribunal to impose a fine for contempt of that tribunal was recognized.

In Kennedy *versus* Dalasile (1919, E.D.C., 1) the Court held that where a charge is general in its terms, although the Defendant in a plea of justification must state some specific instances of misconduct imputed to the Plaintiff it would be sufficient if the substance of the charge were justified.

In Van der Berg *versus* Van der Watt (E.D.C., Vol. XII, p. 55) the Court held that a charge made at a meeting of the Bond (a political body) against a sheep inspector, by a farmer residing in his district, of incompetence and malpractices in the performance of his duty was made in the public interest and consequently, if true, gave no ground for an action for slander.

Applying the foregoing principles to the case now before it this Court arrives at the following conclusions:—

(1) That the inquiry held before the Chief of Western Pondoland was a normal inquiry affecting disputes between members of his tribe, and such as he is entitled to hold.

(2) That the accusations made by Appellant (Defendant in the Court below) against Plaintiff were in the main true.

(3) That it was in the public interest that those accusations should be brought to light.

(4) That the occasion was a privileged one.

In the opinion of this Court the pleas of privilege and justification should have been upheld.

The appeal is allowed with costs and the judgment in the Court below altered to one for Defendant with costs.

1928, November 7. Umtata.

GOBI GAULAYO *vs.* VAKELE NJAZIYALUMA.

(Engcobo Case.)

Before J. Mould Young, A.C.M., President, with G. M. B. Whitfield and F. N. Doran as Assessors.

Slander—Imputation of witchcraft actionable in Native Law and Custom.

JUDGMENT.

By President: Appellant sued Respondent for £50 damages for slander in that he had accused him of having caused his sister-in-law to be hysterical and cry by the use of non-natural means or witchcraft towards her. The words alleged to have been used are " Ndifuna u-Gobi anyange le ntombazana ayibuleleyo ngokuyikalisa ".

Respondent denied using the words complained of or that they were defamatory or capable of bearing the innuendo placed on them or that Appellant had suffered any damages.

After Plaintiff's case was closed the Magistrate apparently on his own motion, and without calling on the Defendant, entered a judgment of absolution from the instance with costs on the grounds:—

(1) That the girl's hysterics were due to Plaintiff's struggle with her.

(2) That whatever words were used had reference to the hysterics.

(3) That the words alleged to have been used had been conclusively proved, and

(4) That whatever the actual words may have been they were used in " rixa " between the parties.

There is sufficient evidence on the record to show that words similar to those complained of were used and, in the opinion of this Court, these words were defamatory in that they conveyed an imputation of witchcraft which in Native Law and Custom is a serious charge, and the Appellant would appear to have a good ground of action.

The appeal is allowed with costs, the Magistrate's judgment set aside, and the case returned to be dealt with on the merits.

1928, November 8. Umtata.

HENENE MAKALIMA *vs.* SAWE MGUDLWA and Others.

(Engcobo Case.)

Before J. Mould Young, A.C.M., President, with G. M. B. Whitfield and F. N. Doran as Assessors.

Affray—Damages for death of son—No action maintainable by parent in respect of damages sustained by him unless he is dependent upon the deceased for his maintenance or has suffered calculable pecuniary loss by his death.

JUDGMENT.

By President: In this case the Plaintiff sued the Defendants jointly and severally N.O. as guardians of the minors Debeza Mato, Ntsontsoyi Noshe, Makeshe Mgudlwa, Zinakele Fojolo and Mbangele Tyuluza for the sum of £100 damages. He alleged in his summons and particulars of claim:—

(1) That in or about the month of November, 1926, the said minors and others assaulted and killed his son Mqweniso Henene and were convicted and each sentenced to undergo twelve months' imprisonment with hard labour for the said offence.

(2) That he has suffered damages in the sum of £100 for the loss of his son for which the Defendants are liable.

The Defendants denied liability and pleaded that Plaintiff's minor son met his death in an affray in which he took part voluntarily and, that having done so, he was " in pari delicto " with the other participants and that they were therefore not liable to Plaintiff for any damages whatsoever. They denied that Plaintiff had suffered damages to the extent of £100 through the loss of his son.

After hearing the evidence from which it appeared that the boy Mqweniso Henene met his death whilst taking part in an affray the Magistrate entered judgment for Defendant with costs holding that, as deceased had taken part in the affray voluntarily, he was bound by the decision in the case of Bubonda Vetezo *vs.* Mpondwana Rayibana (4, N.A.C. 29).

The appeal is brought on the ground that Plaintiff being an innocent third party is entitled to damages..

From the authorities consulted by this Court it would seem that the Plaintiff, being an innocent third party, had a right of action. It is laid down in Maasdorp's Institutes of Cape Law (Vol. IV, p. 16), that an injury may be done to one even through others, as where an injury is inflicted upon one's servants or minor children or wife as an insult to oneself, or where a physical injury is caused to a servant or child which results in damages to the master or parent through the loss of the service of such servant or child. Again on page 15 it is laid down that " in the case of injury to a

person, not only the person himself who has suffered actual bodily injury, but, in case he should succumb to the same, also his wife and children, whether legitimate or illegitimate, or any other person who has a legal claim to maintenance against the injured person, or who has suffered any loss through the death of such person, will have an action for damages for the loss sustained by any of them by reason of such death at any rate to the extent of the loss suffered by each ".

It is also laid down in De Villiers' Roman and Roman Dutch Law of Injuries, page 55, that a person other than the one who gave his consent may, notwithstanding such consent, be entitled to an action of injury in case he has been directly injured by the same act to which consent was given or if he was mediately injured by such act through the person who consented.

In the case of the Union Government *versus* Lee (1927, A.D. 202), is was held that third persons damnified by an injury to a person arising from joint negligence of himself and others do not derive their title to sue through him, or on his death through his estate, that their right to compensation is independent and lies for the material loss sustained by them. As regards the measure of damages to be awarded in such cases it was held in the case of the Union Government *versus* Warnecke (1911, A.D. 657) that there must be proof of calculable pecuniary loss; and, in the case of Bertram *versus* Central S.A. Railways (1905, T.H. 234) it was ruled, *inter alia,* that the benefit of present services of a child to the father was more than compensated by expenses of maintenance and schooling, that the Defendant was entitled to take advantage of such compensating liabilities and was not liable to pay for the loss of such services, and that damages for prospective services, the benefit of which the father might have enjoyed in the future, were too remote.

It would seem therefore that, under certain circumstances which are not present in this case, a father may sue for damages actually sustained by him in connection with the death of his son in an affray. In this case, however, the Appellant, in the opinion of the Court, is not entitled to succeed as he does not allege that he was dependent upon the deceased for his maintenance nor has he proved any calculable pecuniary loss by his death.

The appeal is dismissed with costs.

1928, November 8. Umtata.

SONGOLOLO NTLABATI *vs.* TSHEMESE KRAAI.

(St. Marks Case.)

Before J. Mould Young, A.C.M., President, with G. M. B. Whitfield and F. N. Doran as Assessors.

Practice—Interpleader—Sale of property in execution before expiration of time prescribed by Order XXV (2) Proclamation No. 145 of 1923.

JUDGMENT.

By President: In this case the Respondent, Claimant in the Magistrate's Court, took out a summons on the 24th February, 1928, calling upon the Appellant, the judgment creditor in the case of Mlahlwa Ntlabati *versus* Ndawo Qekuzana to show cause why certain property attached by virtue of a writ of execution issued in that case should not be declared to be unexecutable for the said judgment.

Before taking out this summons he complied with the provisions of Rule 2 of Order XXV of Proclamation No. 145 of 1923.

On that day and before the times prescribed by that Order had expired the Messenger acting on the instructions of the attorney for the judgment creditor sold the property.

On the date of hearing of the interpleader action the judgment creditor excepted to the summons on the following grounds:—

"Respondent doth set up the objection of non-joinder to Claimant's summons, and in support of that objection he doth say that the stock referred to in the summons was attached at the instance of five execution creditors (whereof Respondent was one) and that a judgment in the present matter whichever way it went would not have the effect of freeing the stock from attachment and would not be binding upon the other execution creditors; that the stock under attachment is not divisible.

Wherefore Respondent prays that summons be dismissed with costs. And in the event of the foregoing being overruled, but not otherwise, the Respondent doth except and say that inasmuch the stock referred to in the summons was duly sold at an execution sale and duly delivered to the purchasers thereof, ere the summons was served, there was at the date of such service and now, no stock under attachment and consequently no stock in existence now before this Court in regard to which this Court can give any decision, any decision would be a nullity and of no avail."

This exception was overruled and the case proceeded on its merits, at the conclusion of which the Magistrate declared the property not executable with costs.

Against this judgment an appeal is brought on the following grounds:—

(1) That the exception filed in regard to jurisdiction was a valid bar to the Court below entertaining the Interpleader action, inasmuch there being no live-stock in the hands of the Messenger of the Court, or under attachment at the date of the service of the Interpleader summons, there was no matter before the Court for its decision, and consequently no judgment in the premises relative to the already disposed of live-stock could be carried into execution by any process in law against the Respondent.

(2) That before the service of the summons the live-stock attached under Respondent's writ of execution, had been sold by judicial sale and therefore could not be vindicated.

(3) That prior to the sale of the said live-stock, Respondent had given the Messenger of the Court the requisite security bond, and it was competent to the Claimant to have acted thereon.

In the opinion of this Court the Magistrate correctly overruled the exception. At the time of the issue of the summons the property had not been sold and all the Magistrate had to decide was whether at that time such property was or was not executable and that is all that his judgment conveys.

The appeal is dismissed with costs.

1928, November 10. Umtata.

VULANGENGQELE PONI *vs.* NOLANGENI KOPU.

(Tsolo Case.)

Before J. Mould Young, A.C.M., President, with G. M. B. Whitfield and F. N. Doran as Assessors.

Practice—Writ of Execution—Application to set aside—Section 45 of Proclamation No. 145 of 1923—Satisfaction of judgment by compromise.

JUDGMENT.

By President: On the 14th June, 1928, the Respondent obtained a judgment in the Magistrate's Court of Tsolo against the Appellant for 15 head of cattle, 150 sheep, 50 goats and costs.

On the 16th August, 1928, the Respondent issued a writ of execution for the recovery of this property, and, on the 17th of that month, an ex parte application was made to the Magistrate to stay the execution of this writ pending the

decision of an application to set it aside on the ground that the parties had settled the judgment by compromise. The execution of the writ was stayed. Application was therefore made to the Court to set aside the writ. Evidence was led by the Appellant to the effect that the judgment had been compromised by the acceptance by the Respondent of 5 head of cattle and 60 sheep and the payment of the costs. The Respondent admitted the payment of 5 cattle and 60 sheep but denied that any compromise had been entered into or that he had accepted the stock in full settlement of the judgment.

The Magistrate refused to grant the application to set aside the writ on the ground that the making of such an order would have the effect of varying or rescinding the judgment of the 14th June, 1928, and that he had no jurisdiction to do so.

In the opinion of this Court the Magistrate has erred. The application was not one under the provisions of Section 36 of Proclamation No. 145 of 1923 to vary or rescind his judgment, but one under Section 45 of the Proclamation to set aside a warrant of execution issued by his Court. This section provides that the Court may, on good cause being shown, stay or set aside any warrant of execution or arrest issued by such Court.

The question he had to decide, therefore, was whether the Appellant had shown good cause. Appellant alleged a settlement of judgment by compromise and if that allegation had been substantiated it would, in the opinion of this Court, have been sufficient cause to set aside the writ.

In Nathan's Common Law of South Africa (Vol. 2, paragraph 822) it is set forth " a compromise may be affected with regard to a thing which is uncertain or doubtful (where no judgment in the matter has been given) or with regard to a thing the obligation whereon has been absolutely determined and made certain by judgment (*Res Judicata*) whether such judgment has been finally decided upon or under appeal. Even after judgment on appeal the parties may compromise the matter." At paragraph 823, " The effect of compromise is that it puts an end to a law suit having the effect of *Res Judicata* between the parties."

The appeal is allowed with costs, the Magistrate's judgment set aside and the case returned to him for determination on the merits.

1928, December 1. Lusikisiki.

GQASAYI MAGADLA *vs.* MTSHIKILELWA SMIT.

(Libode Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway and F. C. Pinkerton as Assessors.

Pledge-Pledger cannot demand re-delivery of his property or damages for its wrongful alienation or loss until he has paid the debt due by him in full.

JUDGMENT.

By President: In this case the Plaintiff in convention and Defendant in re-convention, now Appellant, claimed from the Defendant, now Respondent, the sum of £9 being the refund of a loan of £6 together with £3 interest. The Respondent admitted having borrowed £6 and alleges he pledged a cow with the Appellant and in re-convention he claimed the sum of £7 at which he assessed the value of the cow. The Appellant denied that a cow or any other beast was pledged to him as security.

The Magistrate gave judgment for the Plaintiff in convention for £6 with costs and for Plaintiff in re-convention for £7 with costs.

During the hearing in the Magistrate's Court any claim for interest was clearly abandoned. The Magistrate found that the Respondent, Plaintiff in re-convention, had placed a beast with the Appellant as security for the loan and this Court is not prepared to say he was not justified in coming to that conclusion. There is no finding by the Magistrate that the Appellant acted negligently in dealing with the pledged animal.

The authorities produced before the Court show that the pledger cannot demand re-delivery of his property or damages for its wrongful alienation or loss until he has paid the debt due by him in full.

This Court is therefore of opinion that the Respondent in re-convention, is not entitled to an order for the value of the cow pledged by him until he has liquidated the loan made to him.

The claim for interest on the claim in convention in support of which no grounds of appeal have been stated must fail and will be dismissed with costs. The appeal on the claim in re-convention will be allowed with costs and the judgment altered to one of absolution from the instance with costs.

1928, December 3. Kokstad.

JOHANNES MBUSI *vs.* NKULULEKO NZO.

(Mount Fletcher Case.)

Before W. T. Welsh, C.M., President, with F. H. Guthrie and H. E. Grant as Assessors.

Evidence—Record of evidence in previous case inadmissible.

JUDGMENT.

By President: In the opinion of this Court the record of the evidence in the previous case, which appears to have influenced the Magistrate, should not have been admitted. That this is so would appear to be clear from the decisions in the cases of the African Guarantee and Indemnity Co. *versus* Couldridge (1922, E.D.L. 135), Sethathi *versus* Ramolongua Mohlokoana (3, N.A.C. 228) and Goold *versus* Bladwell (1919, T.P.D. 53).

The contract made between the parties was that the Plaintiff was to build a hut for the Defendant and the latter to plough, sow and harrow a land for the former. The Plaintiff has fulfilled his contract and claims damages against the Defendant for the non-fulfilment of his portion of the agreement. This Court is satisfied that the Defendant has not carried out his contract and that this default is not due to the Plaintiff's action.

The appeal will accordingly be allowed with costs and the judgment, which is not clearly stated, will be altered to one for the Plaintiff for £2. 15s. and costs.

1928, July 3. Umtata.

JIM HANI *vs.* BONKOLO and Another.

(St. Marks Case.)

Before J. Mould Young, A.C.M., President, with W. J. Davidson and R. H. Wilson as Assessors.

Seduction and pregnancy—Paternity—Evidence of woman—Credibility.

JUDGMENT.

By President: The facts in this case are in many respects identical with those in the case of Maseti *versus* Maciti, (1, N.A.C. 26) in which the Defendant while admitting having " metshaed " with the girl denied causing her pregnancy and accused another man.

In that case the President stated:—

" The Defendant admits carnal intercourse with the girl, but denies that he is the author of pregnancy. It is a well-established fact that the only person who can positively state whether pregnancy ensues or not from an act of

cohabitation is the woman. No sufficient reason has been advanced why greater benefit or advantage would accrue to the woman from charging the Defendant as the father of the child than if she had attributed that responsibility to anyone else. It is a most unusual thing, as has been before pointed out in this Court, for an unmarried girl to deny the paternity of her child, such an act being considered as not only disgraceful to herself but to her offspring. Natives consequently attach very great importance to a mother's evidence, and in that view this Court agrees."

There are many other cases in which this decision was confirmed after consultation with the Native Assessors.

Maasdorp (Vol. IV at page 125) states:—

"If a man admits having had connection with a girl but denies that he is the father of the child, the girl will be believed as to the paternity, even though it be proved that other men have had connection with her, unless the man can show that, from the date upon which he had connection with her and the other circumstances of the case, it is physically impossible for him to be the father, or unless the Court is of opinion that the woman is generally not worthy of belief."

In this case the Defendant admits being intimate with the girl and there is nothing on the record to indicate that her testimony is false or that she is unworthy of belief. On the contrary she appears to have told her story in a frank and straightforward way.

The appeal is allowed with costs and the Magistrate's judgment is altered to judgment for Plaintiff as prayed with costs.

1929, January 25. Kokstad.

SOFONIA NGQELENI *vs.* ZWELONKE GAVENI.

(Mount Frere Case.)

Before J. Mould Young, A.C.M., President, with H. E. Grant and E. G. Lonsdale as Assessors.

Seduction—Baca custom—Amount of damages payable for seduction not accompanied by pregnancy—"Sidwangu" and "Nqutu" beasts.

JUDGMENT.

By President: The question for decision in this case is what damages are payable according to the Baca Custom for the defloration of a female not followed by pregnancy?

The Magistrate has held that in such cases the "Sidwangu" beast is all that is claimable.

In the opinion of this Court he has erred. The terms "Sidwangu" and "Nqutu" are synonymous. These are animals paid to the women of the girl's kraal when the seducer returns her after elopement. In addition to the "Sidwangu" or "Nqutu" the girl's father or guardian is entitled to damages. These are usually assessed at three head of cattle. When pregnancy follows the number of cattle payable is raised to five.

The appeal is allowed with costs and the Magistrate's judgment altered to judgment for Defendant with costs.

1929, February 6. Umtata.

NTSIMINI NGCONGOLO *vs.* NDLELENI JAJI.

(Engcobo Case.)

Before J. Mould Young, A.C.M., President, with W. J. Davidson and H. E. F. White as Assessors.

Widow—Dowry—Not competent for widow whose dowry has not been returned and who is not residing at her late husband's kraal to give her daughter in marriage and receive dowries for them without consulting her husband's people—Liability of her agent.

JUDGMENT.

By President: The Plaintiff in his capacity as *curator ad litem* claimed from the Defendant 15 head of cattle, 2 horses and 10 sheep or £100 their value, being dowry paid for Noti and Ntsontsoyi, wards of Rauzela Wani Sondlo. Defendant, in his plea, admitted having given these girls in marriage and having received their dowries on behalf of their mother Noyamile.

Noyamile, whose husband died after Rinderpest, left his kraal and resided at her father's kraal for 25 years returning about two years ago to the location where her husband resided during his lifetime. She has since lived with the Defendant at his kraal. During her residence with Defendant the girls Noti and Ntsontsoyi were given in marriage without reference to her husband's relatives. The dowries were paid to and received by Defendant and remained in his possession and were registered at the dipping tank in his name. The guardian, Rauzela Wani Sondlo, has been absent from the district for a period of fourteen years and it was only after application had been made by the Plaintiff for an order appointing him *curator ad litem* to Rauzela Wani Sondlo that he took steps to remove the cattle to another kraal and have them registered in the name of Noyamile.

The Magistrate gave judgment for Plaintiff as prayed on the grounds that Noyamile had no right to receive and detain the cattle, and that the Defendant, as agent, had no better right than his principal, Noyamile. The facts having been put to the Native Assessors they state that a widow, whose dowry has not been returned and who is not residing at her husband's kraal, has no authority to give any of her daughters in marriage and receive dowries for them without consulting her husband's people, and any man with whom she is living, having acted for her, is liable to the guardian or person entitled to hold the dowries.

In view of this statement the appeal is dismissed with costs.

1929, February 2. Umtata.

KATRINA MDODA *vs.* JACOB TOSENI.

(Elliot Case.)

Before J. Mould Young, A.C.M., President, with W. J. Davidson and H. E. F. White as Assessors.

Widow—Rights to use of property of late husband when she has removed from his kraal with the approval of her guardian—Parties resident on private farms.

JUDGMENT.

By President: The Plaintiff in this case sued the Defendant for the delivery of 9 head of cattle or their value £45, £5 damages, and rendition of an account in respect of certain goats and their delivery or payment of their value, being the earnings of herself and her late husband. She alleged that Defendant had wrongfully and unlawfully possessed himself of this stock.

The Defendant in his plea denied that he had wrongfully dispossessed Plaintiff of any cattle and goats. He admitted that he was in possession of certain stock and said that, as guardian of the minor children of Plaintiff's late husband he was entitled to retain it.

The Plaintiff is the widow of the late George Mdoda, who had been previously married to a Native woman, whom he drove away, and to Plaintiff's sister, who died about 1918.

The Defendant is the younger brother of the late George Mdoda.

After the death of her husband the Plaintiff continued to live on the farm Corryvrechan in the District of Elliot where her husband had been employed. Some time after his death

Mr. Gray, the owner of the farm, gave her notice to remove her husband's stock, which consisted of nine head of cattle and certain goats. The Defendant, who also resided on the farm, raised no objection and consented to her removing to her brother's home on the farm Talorgan but advised her to allow the stock to remain until the condition of the grazing should improve. Subsequently, and after she had been with her brother for some time with Defendant's approval, she made repeated attempts to remove the stock. But Defendant refused to allow her to do so and failed to maintain her and the children of her late husband.

The Magistrate, with these facts before him, held that the Defendant and the late George Mdoda, being full brothers, Defendant as the nearest male major relative is entitled to share jointly with the widow the property of her late husband and that she cannot claim to be placed in possession of such property.

It has been laid down repeatedly by this Court that as long as a widow continues to reside at the kraal of her late husband, or some other kraal approved of by her guardian, she is entitled to the use of the estate stock for support of her children and herself. The Defendant having approved of her residing on the farm Talorgan has neither right nor reason for depriving her of the use of the stock. The circumstances in this case are somewhat peculiar and have been occasioned by the fact that parties do not reside in a Native location but on private farms. Had they been residents of a Native location such a position would not have arisen.

The appeal is allowed with costs and the Magistrate's judgment altered to judgment for Plaintiff for the delivery of 9 head of cattle or their value £45 and 11 goats or their value £11 and costs.

1928, March 16. Umtata.

NKONYO MANELI *vs.* JOLINKOMO MLONYENI.

(Elliotdale Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson and H. E. F. White as Assessors.

Wives—Ranking of—Right of "Qadi" or junior wives and their heirs to succeed where no male issue in the higher ranks.

JUDGMENT.

By President: This Court has frequently ruled that when a Great Wife dies without leaving a male issue the woman married thereafter replaces her and her son would consequently be the heir to the Great House.

The Magistrate has found on the evidence and the probabilities that Notasi was thus married into the late Maneli's Great House and that the Plaintiff is entitled to succeed to the cattle in dispute. The Magistrate has given this case his careful attention and this Court is not prepared to interfere with his decision.

The appeal is dismissed with costs.

1928, November 20. Butterworth.

NQOLA TYOBA *vs.* SIKADE VUTA.

(Willowvale Case.)

Before W. T. Welsh, C.M., President, with F. H. Brownlee and F. E. G. Munscheid as Assessors.

Wives—Ranking of—Status of fifth wife—Dowry—Payment of dowry by the Right Hand House for a "Qadi" wife to the Great House to be refunded out of the dowry of her eldest daughter.

JUDGMENT.

By President: This is an interpleader action in which the Appellant claimed certain cattle which were attached in the suit of Sikade Vuta *versus* Tukani Tyoba.

The Magistrate declared the cattle to be executable and the Claimant has appealed on the ground the cattle attached were the dowries of two daughters of the late Tyoba by his fifth wife Nomakisi who he alleged was married as a seed-bearer to a barren wife of the Qadi of his father's Right Hand House.

It is admitted that the late Tyoba had five wives and the question for decision is whether Nomakisi appertains to his Great House or his Right Hand House. If the dowries under attachement are the property of the Great House they are executable, if the property of the Right Hand House they are not.

The Native Assessors, Tafelihle Sokoyi, Langa Sokapase, Zulu Mapasa, Matumbu Manxiwa and Mehlomane Dlepu having been consulted state:—

That according to Native Custom when a man has five wives the fifth wife belongs to the Great and not to the Right Hand House and that this is so even when the fourth wife, the Qadi to the Right Hand House, is without issue.

They also state that when the Right Hand House provides the dowry of the fifth wife she nevertheless belongs to the Great House and the dowry paid for her is refunded to the Right Hand House out of the dowry received for her eldest daughter.

In the opinion of this Court it is clear that the cattle attached are the property of the Great House of the late Tyoba and that the Magistrate was fully justified in declaring them executable.

The appeal is dismissed with costs.

1929, February 7. Umtata.

HOBOLOLO BOKILENI *vs.* NTHLOYILA BOKILENI.

(Elliotdale Case.)

Before J. Mould Young, A.C.M., President, with W. J. Davidson and H. E. F. White as Assessors.

Wives—Ranking of—Bomvana Custom—Not competent for commoner to nominate the rank of or to change the status of his wives.

Judgment.

By President: In this case the late Bokileni, father of the parties, married four wives in the following order:—

(1) Nogoli, (2) Norauti, (3) Nogilanti, (4) Nokimbili.

The Plaintiff, now Appellant, is the son of Nokimbili, the fourth wife and Defendant, now Respondent, is the son of Nogilanti, the third wife.

The Plaintiff's allegation is that, at the time of the marriage of Nokimbili, his father, the late Bokileni, called a meeting of relatives and others for the purpose of nominating the rank of the wives and declared that Nokimbili was to be his Great Wife, his second wife Norauti to be his Right Hand Wife and Nogilanti and Nogoli "Qadis" of the Great and the Right Hand Houses respectively.

It is common cause that there are no sons in the houses of Nogoli and Norauti, that Plaintiff is the only son of Nokimbili, and Defendant the eldest son of Nogilanti.

The Magistrate, after some evidence had been led, was asked to give a ruling, whether or not it is in accordance with Bomvana Custom for a commoner to change the status of his wives in the circumstances stated in the particulars of claim and the evidence heard. He decided that Bomvana Custom does not permit of a commoner changing the status of his wives and that, supposing this could be done for good and sufficient reason, the reasons advanced by Plaintiff are not sufficient.

With this ruling this Court concurs. In the case of Petu Yoywana *versus* Tsono Yoywana (3, N.A.C. 301) the President stated, *inter alia*:—

"Under Native Custom, common people do not nominate the rank of their wives but their rank and status follow in the order of thier priority in marriage and it is only chiefs who exercise the right of nominating the rank of their wives and even in the custom as followed by the chiefs there seems to be a diversity in the practice, for, while in Tembuland a chief may depose a wife from her rank should he subsequently marry a woman of superior rank from the same tribe, yet in Gcalekaland it is held to be the custom that once a chief's wife has had her precedence assigned to her she may not be deposed from it even should a woman of superior rank in the tribe, from which she was married, be married after her. In the case of common people it is the custom that the first woman married is the Great Wife and the second is the Right Hand Wife, the next is the Qadi, or supporting wife, of the Great House and the next after that is the Qadi of the Right Hand House, and this is the invariable order and common people may not alter the precedence of their wives once they have been married."

The appeal is dismissed with costs.